IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 509 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDUL SALIM GULAMNABI DIWAN - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS SADHANA SAGAR for Appellant(s) : 1 - Appointed
MR. K.T.DAVE, APP for Respondent(s) : 1

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 25/01/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The Appellant ("the accused" for short) was charged and tried by the learned Additional Sessions Judge, Bharuch, for commission of the offences punishable under Sections 498A and 306 of the Indian Penal Code ("IPC" for short) in Sessions Case No. 190 of 1994 on the accusation that he inflicted mental and physical cruelty to his wife - deceased Suman, and abetted her to commit suicide.

2. At the end of the trial, as the accused was found guilty of the offence with which he was charged, he was convicted vide judgment and order dated 29.05.2002 for commission of the offence punishable under Section 498A and 306 IPC, and was sentenced to suffer RI for 10 years and fine of Rs.1000/- i.d. RI for one month for the offence punishable under Section 306 IPC, and RI for 2 years and fine of Rs.500/- i.d. RI for 15 days for the offence punishable under Section 498A IPC. It is also ordered that both the sentences shall run concurrently.

3. The accused, aggrieved by the said order of conviction and sentence, has filed this Criminal Appeal with the aid of Section 374 of the

Criminal Procedure Code, 1973 ("the Code" for short).

4. The prosecution case as disclosed from FIR and unfolded during trial is as under.

4.1 PW-1 Sunandaben Chimanlal Vasawa, in a complaint lodged by her, has stated that she has got two son and two daughters. Her youngest daughter Suman had married with Abdul Salim Diwan (accused) prior to 9 years of the incident. It was a love marriage. As Suman had married with Abdul Salim Diwan, she changed her name as Salima Bivi. As per the averments made in the complaint, her daughter Suman and her husband were living separately in new colony. From the wed-lock with the accused, she gave birth to two daughters who are also staying with them.

4.2 As per the further averments made in the complaint her daughter Suman was visiting her house of and on. When she was visiting her house she was complaining that her husband - Salim used to beat her and quarreled with her on the false plea that she was having illicit relations with other males and she was subjected to physical and mental cruelty on that account.

4.3 On a Christmas festival on 25.12.1992, her daughter came to her house and her elder daughter Champa also came to her house on account of Christmas festival. At that time her daughter

Suman informed her as well as her elder daughter and other persons of the family that her husband came in drunken condition on 24.12.1992 and picked up quarrel and beat her.

4.4 It is the further case of the prosecution that on 28.12.1992 when she was at her home, one Devendra Vasawa, residing in neighbour-hood of her daughter Suman came to her house in the night and informed that Suman received burn injuries. She, therefore, in the company of her two sons went to the place of her daughter Suman in Autorickshaw. In the meantime, she came to know that Suman was taken to Rural Dispensary, Sewa. So, they want to the said Dispensary. They saw that dressing was being done to her daughter Suman in dressing room. She was burnt on the whole body. Therefore, she inquired from her daughter with regard to the incident. Her daughter replied that on the previous night her husband harassed and threatened her by taunting that she was keeping illicit relations with other males. She, therefore, had poured kerosene on her body and ablaze herself by lighting a match-stick. She further informed that at that time her husband was sitting outside. Upon her shout, her husband came in and tried to extinguish the fire by pouring water. It is further alleged that her Son-in-Law Abdul Salem Gulambhai, accused has inflicted mental and physical cruelty upon her by saying that she was keeping illicit relations

with other males and also beat her in a drunken condition at home. It is further alleged that on account of physical and mental cruelty meted out to her, under sheer frustration she ablaze herself and committed suicide. It is also alleged that during the course of treatment, her daughter succumbed to the burn injuries.

4.5 Therefore, a complaint for the aforesaid incident was filed before PW-11 Devjibhai Kanjibhai, Dy. S.P., Ankleshwar. On the basis of the said complaint, offence was registered against the accused under Section 498A and 306 IPC. Prior to that, Accident Death No. 1/1993 was also registered before the Dy. S.P., Ankleshwar.

4.6 After registration of the complaint, investigation was handed over to PW-49, Purshottambhai Shankarbhai. During the course of the investigation he has drawn panchnama of the scene of the offence, held inquest on the dead body of deceased Suman and sent her dead body for autopsy. He also collected dying declaration which was recorded by the Executive Magistrate. As per the hospital entry received from the Jagadiya Sewa Rural Hospital, the statement of the witnesses were also recorded.

4.7 On completion of the investigation, as sufficient incriminating evidence was found

against the accused for commission of the offence punishable under Sections 498A and 306 IPC, he filed charge sheet in the Court of the learned Judicial Magistrate First Class, Jagadiya.

4.8 As the offence punishable under Section 306 is exclusively triable by the Court of Sessions, the learned Judicial Magistrate First Class, Jagadiya committed the case to the Court of Sessions, Bharuch. The learned Additional Sessions Judge, Bharuch, to whom the case was made over for trial, framed charge against the accused for commission of the offence punishable under Sections 498A and 306 IPC. The accused pleaded not guilty to the charge and claimed to be tried. Thereupon he was put to trial and tried by the trial Court in Sessions Case No. 190 of 1994.

4.9 In order to bring home the charge level against the accused, the prosecution has examined as many as 12 witnesses and relied upon their oral testimony, details of which are given in paragraph 7 of the impugned judgment. They are as under:

PW-1	**Name**	**Exh.**	**Page No.**
1	Sunandaben Chimanbhai Vasawa	11	31

PW-1	Name	Exh.	Page No.
2	Chimanbhai Narottambhai Vasava	13	36
3	Devendrabhai Nanubbai Vasava	14	38
4	Pravinbhai Chimanbhai	15	39
5	Ramanbhai Narottambhai	16	41
6	Ranjitbhai Kalidas Vasava	18	42
7	Shanabhai Jethabhai Vasava	20	46
8	Ratilal Mansangbhai Vasava	21	47
9	Jitenra Zinabhai Rathod	24	50
10	Gulamhusan Yusufmiya Malak	29	64
11	Devjibhai Kanjibhai Bava	48	84
12	Parasttambhai Shankarbhai	49	85

4.10 The prosecution has also produced number of

documents and relied upon the contents of the same. The are as under:

Srl. No.	Description	Exh.	Page No.
1	Entry of Police Station	30	66
2	Appl. of Jhagadia Police Station	31	67
3	Appl. of Jagadia Police Station for taken D.D.	40	81
4	Dying Declaration	41	82
5	Complaint	12	34
6	Panchnama of place of offence.	32	69
7	P.M. Note (Salambibi Abdul Salim Diwan)	26	55
8	Inquest Panchnama	19	44

4.11 After recording of the evidence of the prosecution witnesses was over, the trial Court explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his

further statement the accused denied the case of the prosecution in its entirety. He has stated in his further statement that at the time of incident his stomach was operated. Therefore, he was not in a position to walk. He has also produced the medical case paper. He has further stated that his two daughters are staying with him. He neither led any evidence nor examined any witness to support his defence.

4.12 On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial Court has held that the prosecution has proved beyond doubt that the deceased Suman has died a suicidal death. It is also held by the trial Court that the deceased was subjected to mental and physical cruelty at the hands of the accused as the accused constantly doubted the character of the deceased Suman and he has also abetted the deceased Suman to commit suicide. On the basis of the aforesaid finding, the trial Court held that the complicity of the accused has been proved. He, therefore recorded the finding of guilt against the accused and resultantly he convicted the accused for commission of the offence punishable under Sections 498A and 306 IPC and sentenced him to suffer RI to which reference is made in earlier paragraph of the judgment which has given rise to the instant Appeal, at the instance of the accused from Jail.

5. Ms. Sadhana Sagar, learned advocate appointed by the legal aid committee to assist the accused, has contended that there is no evidence regarding mental and physical cruelty meted out to the deceased Suman by the accused. There is also no evidence that the accused has abetted the deceased to commit suicide. It is also submitted by her that all the witnesses examined by the prosecution, who are only near and dear relatives of the deceased, have not supported the prosecution case. According to her, there is no dispute that the deceased died a suicidal death. The accused has not abetted her to commit suicide. There is no evidence to the effect that prior to the incident deceased was subjected to mental and physical cruelty at the hands of the accused. According to her, if we examine the dying declaration of the deceased, recorded by the Executive Magistrate, it is seen that since her husband was doubting her character, quarrel took place between them and therefore, with a view to put an end to her life she committed suicide, for which the accused cannot be held responsible. There is no evidence to the effect that prior to the said incident, the accused has abetted her to commit suicide. The total span of their marriage life is 9 years and there was no complaint at all in the said span of their marriage life. On the aforesaid premises, it is submitted by Ms. Sadhana Sagar, learned advocate

of the accused that there is no case against the accused for commission of the offence punishable under Sections 498A and 306 IPC. The trial Court has wrongly believed the case of the prosecution, more particularly the dying declaration, and convicted the accused of the offence punishable under Sections 498A and 306 IPC. Therefore, the impugned judgment and order convicting and sentencing the accused for the offence punishable under Sections 498A and 306 IPC deserves to be quashed and set aside by allowing this Appeal and thereby acquitting the accused of the offence with which he was charged. She, therefore, urged to allow this Appeal.

6. In counter submission Mr. K.T.Dave, the learned APP appearing for the Respondent - State of Gujarat has contended that there is voluminous evidence to establish that the deceased was subjected to mental and physical cruelty and the accused has also abetted the deceased to commit suicide because the accused was doubting her character by saying that she has got illicit relation with other male members. According to him, doubting the character of wife by husband itself amounts to mental and physical cruelty meted out to her and on account of that mental and physical cruelty, if wife commits suicide, then the same amounts to abetting her to commit suicide. On the aforesaid premises it is submitted by him that the Appeal filed by the

accused lacks merit and deserves to be dismissed. Therefore, according to him, the judgment and order convicting the accused for the offence punishable under Sections 498A and 306 IPC does not call for any interference of this Court in exercise of appellate power. He contended that the Appeal lacks merit and deserves to be dismissed. He, therefore urged to dismiss the Appeal.

7. We have considered the submissions advanced by Ms. Sadhana Sagar, learned Advocate of the Appellant and Mr. K.T.Dave, learned APP for the Respondent - State of Gujarat. We have also perused the impugned judgment and order. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. On reanalysis, reevaluation, re-appreciation and close scrutiny of the evidence, the following are the salient features of the prosecution case and the intrinsic evidence which have come on record:

(i) Marriage of the deceased Suman with accused was solemnized prior to 9 years of the incident.

(ii) Initially for a period of almost 8 years, there was no problem between the accused and the

deceased Suman and the marital life was quite cordial.

(iii) Deceased committed suicide on 28.12.1992.

(iv) There is no allegation for initial period of 8 years that the deceased was subjected to mental and physical cruelty at the hands of the accused.

(v) In her dying declaration before the Executive Magistrate the deceased Suman has narrated that on account of false allegations about her character, she committed suicide out of frustration and her husband also tried to save her from fire by sprinkling water on her.

9. In aforesaid backdrop of the undisputed fact situation, we will have to examine whether the prosecution has successfully established the charge leveled against the accused for commission of the offence alleged against him and also to find out whether the trial court has rightly appreciated the evidence on its proper perspective and rightly recorded the finding that the complicity of the accused of the offences with which he was charged has been proved.

10. There is no dispute that the deceased died a suicidal death. To prove this aspect, prosecution has examined and relied upon oral testimony of PW-9 Dr. Jitendra Zinabhai Rathod at exh. 24, page 50. He has inter alia testified that at the

relevant time he was serving as Medical Officer at Jagadiya Rural Hospital. At that time, dead body of Suman was brought to him for autopsy. He has performed the autopsy. He has also issued autopsy report at exh. 26. A conjoint reading of oral testimony of PW-9 Dr. Jitendra Zinabhai Rathod at exh. 24 and the autopsy report at exh. 26 shows that the deceased died because of shock due to cardio-respiratory failure due to septicemia following extensive burns. In view of the aforesaid evidence, according to us, prosecution has proved that the deceased Suman has died homicidal death and the learned Judge has rightly given the finding that the deceased died a homicidal death.

11. After having held that the deceased died a homicidal death, the next question that arises for consideration is as to whether the deceased was subjected to mental and physical cruelty at the hands of the accused and the accused has abetted the deceased to commit suicide. It may be noted that PW-1 Sunandaben Chimanbhai Vasava, at exh. 11, PW-2 Chimanbhai Narottambhai Vasava at exh.13, PW-4 Pravinbhai Chimanbhai at exh.15, PW-5 Ramanbhai Narottambhai at exh.16, who are near and dear relatives of the deceased, have not supported the prosecution case and they have deposed before the Court that a settlement has been arrived at between the parties. They, therefore, were declared hostile and cross-

examined by the learned APP. During their cross-examination, they also stuck to similar version and reiterated that the relation of the accused with the deceased Suman was cordial.

12. In view of the aforesaid state of affairs, the only evidence, which is required to be considered by this Court is that of PW-8 Ratilal Mansangbhai Vasava at exh. 21, page 47, who is the Executive Magistrate and has recorded the dying declaration of the deceased, which is on record at exh.41. On a conjoint reading of oral testimony of PW-8 Ratilal Mansangbhai Vasava, and the dying declaration of the deceased Suman at exh. 41, it is seen that PW-8, Ratilal Mansangbhai Vasava, has recorded the dying declaration after obtaining the Doctor's opinion, and as per the said opinion, the deceased was in conscious condition. Therefore he has recorded the dying declaration, before whom the deceased has stated that on 28.12.1992 at 7:30 pm she herself ablaze herself by sprinkling kerosene on her body. She has stated that she is a Christan by religion and she has married with the accused, who is a Muslim. Total span of their marriage life was 10 years and out of the said marriage she gave birth to two female children. She further stated that her husband was making false allegations against her about her character and thereby picking up quarrel with her, and therefore, on account of frustration, she poured

kerosene on her body and ablaze herself. She also stated that on hearing her cry, her husband came to her rescue and sprinkled water on her body and tried to save her, and, thereafter, she was admitted to the hospital. In view of the aforesaid dying declaration, the question that is required to be answered by this Court is, as to whether the accused abetted her to commit suicide.

13. It is settled legal provisions of law that for bringing home the charge under Section 306 of IPC, there must be some evidence adduced on record showing that soon before the incident there was some harassment and torture to the deceased at the hands of the accused. Section 107 of IPC is with regard to the abetment and as per the provisions of this section, there must be some evidence that soon before the incident there must be some incident due to which she was prompted, instigated or abetted to commit suicide.

14. So far as the reported decision laying down the proposition of law on the question of abatement to commit suicide is concerned, they are legion. However, we would not make a reference to all of them with a view to avoid the repetition and to burden this judgment. Some of the reported recent decisions are as under :-

(i) In case of **SUSHIL KUMAR SHARMA vs. UNION OF INDIA**, reported in 2005 AIR SCW p.3569, the Supreme Court makes it very abundantly clear that mere harassment or cruelty by the husband or his relatives would not constitute an offence of abetting the commission of suicide. Supreme Court in four lines has explained the correct position of law very succinctly. The relevant paragraph is reproduced herein below :

"Basic difference between the two Sections i.e. Section 306 and Section 498-A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the women concerned to commit suicide while under the former provision suicide is abetted and intended."

(ii) In **SWAMY PRAHALADDAS vs STATE OF M.P. & Anr**. Reported in 1995 Supp.(3) SCC p.438, the appellant was charged for an offence under Section 306, IPC on the ground that the appellant during the quarrel is said to have remarked the deceased 'to go and die'. The Supreme Court was of the view that mere words uttered by the accused to the deceased 'to go and die' were not even prima-facie enough to instigate the deceased to commit suicide.

(iii) In **MAHENDRASINH vs. STATE OF M.P.,** reported in 1995 Supp. (3) SCC p.731, the

appellant was charged for an offence under Section 306 IPC mainly based upon the dying declaration of the deceased, which reads as under:-

“My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry second time. He has illicit connections with my sister-in-law. Because of those reasons and being harassed I want to die by burning.”

The Supreme Court, considering the definition of 'abetment' under Section 107 IPC found that the charge and conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment to the deceased. The Supreme Court further held that neither of the ingredients of abetment are attracted on the statement of the deceased.

(iv) In **RAMESH KUMAR VS. STATE OF CHHATTISGARH** reported in (2001) 9 SCC p.618, the Supreme Court while considering the charge framed and the conviction for an offence under Section 306 IPC on the basis of dying declaration recorded by an Executive Magistrate, in which she had stated that previously there had been quarrel between the deceased and her husband on the day of occurrence she had a quarrel with her

husband who had said that she could go wherever she wanted to go and that thereafter she had poured kerosene on herself and had set fire, acquitting the accused the Supreme Court said:-

“A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life quite common to the society to which the victim belonged and such petulance discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged for abetting the offence of suicide should be found guilty.”

(v) In **Sanju alias Sanjay Singh Sengar v. State of Madhya Pradesh,** 2002 AIR SCW 2035 (SC), the Supreme Court in para 13 has observed as under:-

“Even if we accept the prosecution story that the appellant did tell the deceased 'to go and die', that itself does not constitute the ingredient of 'instigation'. The word 'instigate' denotes incitement or urging to do

some drastic or unadvisable action or to stimulate or incite. Presence of mens rea, therefore, is the necessary concomitant of instigation. It is common knowledge that the word uttered in a quarrel or in a spur of the moment cannot be taken to be uttered with mens rea. It is in a fit of anger and emotional."

15. The principle of law which has been explained in each of the above referred judgments of the Supreme Court is that before a person can be held guilty for abetting the commission of suicide, the prosecution must establish by cogent, convincing and overwhelming evidence that the accused intended the consequences of the act namely suicide and abetted the suicide within the meaning of Section 107 of IPC. Mere harassment or cruelty which drags the woman to commit suicide is not sufficient to constitute the offence under Section 306 of IPC.

16. Applying the principle laid down by the Supreme Court in above referred to judgements to the facts of the instant case, we are of the considered opinion that mere allegations by the accused against the deceased about her character ipso facto, cannot prove offence under Section 306 IPC. To bring home the charge under 306 IPC there must be some evidence adduced on record showing that soon before the incident there was some harassment and torture to the deceased at

the hands of the accused and as per Section 107 IPC, there must be some evidence that soon before the incident there must be some incident due to which she was prompted, instigated or abetted to commit suicide. Therefore, the prosecution has not successfully established the offence of abetment to commit suicide by the accused. Therefore, the judgment convicting the accused under Section 306 IPC does not stand to scrutiny of this Court. Therefore, it has to be quashed and set aside, and accordingly, we quash and set aside the judgment and order convicting the accused for the offence under Section 306 IPC and resultantly we acquit him for the charge under Section 306.

17. Now coming to the charge under Section 498A IPC, i.e. cruelty, it is required to be appreciated that it speaks of cruelty by husband. On threadbare examination of dying declaration it is seen that the accused had doubted the character of the deceased and doubting the character of a wife by the husband that itself is amounting to mental and physical cruelty meted out to wife.

18. Even in complaint exh. 12 lodged by PW-1 Sunandaben Chimanbhai Vasava, deceased has declared before her and her elder sister on 25.12.1992 during Christmas festival that on 24.12.1992, her husband came in drunken

condition, beat her by alleging against her that she was having illicit relations with other male members. Therefore, according to us, the offence under Section 498A against the accused is duly proved and established and therefore, complicity of the accused for the said offence is established. In view of this, the finding recorded against the accused convicting him for the offence under Section 498A does not call for interference of this Court in this Appeal and the said finding has to be affirmed and confirmed, and accordingly, we affirm and confirm the finding of convicting the accused for the offence under Section 498A.

19. The learned trial Judge has sentenced the accused to undergo RI for a period of 2 years for commission of the offence under Section 498A of the Act. So, the question that is required to be considered is as to whether the sentence of RI for 2 years imposed on the accused is required to be interfered with by modifying and reducing the same. In this connection, there is evidence on record that the accused is having two minor female children who are staying with him and as per the jail record sheet, issued by the Deputy Superintendent, Baroda Central Jail, the accused has up till now undergone 7 months and 8 days sentence and at present he is on bail.

20. In the case of **Suresh Damu Mistry v.**

State of Maharashtra, (2005) 11 SCC 585, Supreme Court has considered what is appropriate sentence under Section 498A IPC. The High Court has reduced the sentence of one year RI with fine of Rs.200 imposed by the trial Court to 6 months' RI with fine of RS.1000/-. Supreme Court further reduced the sentence to the period of RI already undergone of 3 months.

21. Applying the principle laid down by the Supreme Court in above referred to judgment to the facts of the present case and the mitigating circumstances with regard to maintaining the 2 minor female children by the accused and the period of sentence undergone, which is more than 7 months, according to us, while maintaining and upholding the conviction under Section 498A, sentence of RI of 2 years imposed by the learned trial Judge is required to be modified by reducing it to the extent of period of sentence undergone by the accused.

22. For the foregoing reasons, the Appeal succeeds in part and accordingly it is partly allowed. The judgment and order convicting and sentencing the accused for commission of the offence punishable under Section 306 IPC is hereby quashed and set aside whereas the judgment and order convicting the accused for commission of the offence under Section 498A is hereby confirmed and maintained. While upholding the

conviction recorded under Section 498A against the accused, we modify the sentence of RI of 2 years by reducing it to the sentence already undergone by the accused.

23. The accused is on bail, therefore, his bail bond stands canceled and the surety is discharged.

(A.M.Kapadia,J)

(K.A.Puj,J)

Jayanti*